

NO. A11-1841

State of Minnesota  
 In Supreme Court

Roger A. Giersdorf,

*Employee-Respondent,*

vs.

1. A & M Construction, Inc.,
2. Merrimac Construction Co., Inc.,

*Employers-Respondents,*

and

- 1a. Uninsured,
- 1b. The Hartford,
2. General Casualty Co.,

*Respondent,**Insurer-Relator,**Insurer-Respondent,*

and

1. Rivers Edge Hospital & Clinic,
2. New River Medical Center,
3. Mayo Clinic,
4. Minneapolis Clinic of Neurology,
5. MN Dept. of Labor & Industry/VRU,
6. MN Dept. of Human Services,
7. Hennepin Faculty Associates,
8. Consulting Radiologists,
9. HealthPartners, Inc.,

*Intervenors-Respondents.*


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**INSURER-RELATOR'S REPLY BRIEF**

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## LEGAL ISSUE

- I. Whether this court should consider the employer-respondent's amendments to the pleadings made subsequent to the issuance of the Writ of Certiorari.**

This issue was not addressed by the workers' compensation courts.

- II. Whether the workers' compensation courts have subject matter jurisdiction to address employer-respondent's Amended Petition for Declaration of Insurance Coverage, alleging an ineffective cancellation of its workers' compensation policy.**

This issue was not addressed by the Workers' Compensation Court of Appeals or by the compensation judge.

## ARGUMENT

### **I. This court should not consider amendments to the employer-respondent's pleadings made subsequent to the issuance of the Writ of Certiorari.**

On October 17, 2011, the relator, The Hartford, filed with this court a Petition for Writ of Certiorari, which Writ was issued on October 17, 2011. On November 16, 2011, The Hartford filed its Appeal Brief, addressing issues raised in the employer-respondent's original Petition for Declaration of Insurance Coverage and specifically addressing whether the employer's claims constitute a breach of contract action over which the workers' compensation courts have no jurisdiction.

On or about December 12, 2011, the employer-respondent pursuant to Minn. R. 1415.1000 filed an "Amended Petition for Declaration of Insurance Coverage" with the Workers' Compensation Division, alleging, in part, that The Hartford failed to comply with statutory procedures when it cancelled the employer's workers' compensation policy and, therefore, the cancellation was ineffective.<sup>1</sup>

On or about December 14, 2011, the employer-respondent and the employee-respondent filed a joint Appeal Brief and have attempted to supplement the record on appeal by appending to their Brief a copy of the Amended Petition for Declaration of Insurance Coverage. In their Appeal Brief, the employer and employee contend, in part, the workers' compensation courts have jurisdiction over the claim in view of the

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<sup>1</sup> Minn. R. 1415.1000, subp. 5 states, in part, as follows: "If petitioner seeks to add an additional claim, withdraw a claim, or otherwise change the claimed benefits or other assertions that do not change the identified parties, the petitioner may amend the claim by filing an amendment to the petition . . .; however, a judge or the commissioner shall disallow an amendment or continue the proceeding if the adverse party has insufficient time to prepare for a proceeding regarding the new issues."

additional, specific allegations that The Hartford did not follow the requisite statutory procedures in cancelling the workers' compensation policy. In essence, the employer and employee assert that if the policy was not effectively cancelled, the policy remains in effect, resulting in a coverage dispute over which the workers' compensation courts have jurisdiction.

The Amended Petition raises new allegations which were not addressed by the compensation judge at the time of the motion hearing held on May 2, 2011, nor were they specifically addressed by the Workers' Compensation Court of Appeals in its decision served and filed September 20, 2011.

The Amended Petition should not be considered a part of the record for purposes of this appeal. Minn. R. App. P. 110.01 provides that the composition of the record on appeal consists of the papers filed in the trial court, the exhibits and the transcript of the proceedings, if any. As the Amended Petition was not in existence at the time the Writ of Certiorari was issued and when the original record on appeal was certified, it should not be considered a part of the record before the court.

The relator maintains the only issues this court should address at this time are the issues raised in the employer's original Petition for Declaration of Insurance Coverage. The additional allegations raised in the Amended Petition including arguments based upon the amended pleadings should not be considered by this court.

**II. Whether the workers' compensation courts have subject matter jurisdiction to address employer's Amended Petition, alleging an ineffective cancellation of its workers' compensation insurance policy.**

In the event this court considers the allegations raised by the employer in its amended pleading, The Hartford maintains the workers' compensation courts do not have jurisdiction to address the employer's allegations that The Hartford did not follow the requisite statutory procedures when cancelling the workers' compensation policy.

Taken as a whole, the allegations in the employer's Amended Petition provide two separate theories of recovery. The employer specifically alleges that The Hartford's attempt to cancel the workers' compensation insurance policy was ineffective and, therefore, the policy remained in effect at the time of the employee's claimed injury. If the employer is not successful in establishing an ineffective cancellation of the policy, the employer appears to be pleading in the alternative that The Hartford breached the terms of the insurance contract when it cancelled the policy in December 2008 and would not allow the employer to make installment payments for the past premiums due.

Presumably, the employer is pleading in the alternative to avoid the harsh consequences of the doctrine of bar and merger. In other words, if the employer were to bifurcate the claim to allege, first, an ineffective cancellation of the insurance policy, while reserving the possibility of pursuing at a later date a breach of contract claim if not successful with its initial theory of recovery, the employer runs the risk of waiving its breach of contract claim. *See Mattsén v. Packman*, 358 N.W.2d 48 (Minn. 1984).

However, by pleading alternative theories of recovery, one based upon an alleged ineffective cancellation of the policy and the other based upon an alleged breach of contract, the employer strips the workers' compensation courts of jurisdiction. As more fully set forth in the relator's Appeal Brief, the workers' compensation courts do not have jurisdiction over a breach of contract dispute. As the workers' compensation courts cannot secure jurisdiction over the entire claim and cannot fashion appropriate remedies based upon the allegations raised in the Amended Pleadings, the entire claim filed with the Workers' Compensation Division must be dismissed.

The allegations raised in the amended pleading should be addressed in the District Courts. The District Courts have concurrent jurisdiction over coverage disputes and, given the allegations set forth in the amended pleading, would be able to appropriately address all issues and fashion appropriate remedies. *See Henning v. Wineman*, 306 N.W.2d 550 (Minn. 1981); *See also* Minn. Stat. § 176.301, subd. 1.

If, however, by filing the Amended Petition the employer has withdrawn its breach of contract claim and intends to proceed solely on the alleged ineffective cancellation theory of recovery, the workers' compensation courts would still not have jurisdiction given the present allegations. In its amended pleadings, the employer has alleged The Hartford did not "send" a notice of cancellation to the employer and the employer did not receive the notice. The Hartford denies these allegations and maintains it provided legally-sufficient notice of cancellation of the insurance policy to the employer. These allegations raise legal issues regarding notification requirements when cancelling a workers' compensation insurance policy. Minn. Stat. § 60A.38, subd. 4 provides that

“Unless otherwise specifically required, the United States Postal Service proof of mailing of the notice of cancellation . . . is sufficient proof that proper notice has been given.” The provisions of Minn. Stat. § 60A.38 apply to the cancellation of workers’ compensation policies as specifically stated in Minn. Stat. § 60A.352. In view of these allegations and corresponding defenses, a court would need to address the interplay between the notice requirements under Minn. Stat. § 176.185 and the requirements under Minn. Stat. § 60A.38, subd. 4. However, the jurisdiction of the workers’ compensation courts is limited to questions of law and fact arising under the workers’ compensation laws of Minnesota as more fully set forth in Minn. Stat. § 175A.01, subd. 5, and the workers’ compensation courts do not have jurisdiction to interpret the statutory provisions of ch. 60A. Historically, this court has recognized the statutory limits of the jurisdiction of the workers’ compensation courts. For example, in *Taft v. Advanced United Expressway*, 44 Minn. Workers Comp. Dec. 35, 464 N.W.2d 75 (Minn. 1991), this court held the Workers’ Compensation Court of Appeals lacks subject matter jurisdiction over claims for contribution and/or reimbursement as against the Minnesota Insurance Guaranty Association (MIGA), as the workers’ compensation courts are not empowered to interpret the provisions of Minn. Stat. ch. 60C, which provisions define MIGA’s liability for a “covered claim.” The same rationale applies to the present dispute. As The Hartford asserts the resolution of the notification dispute necessarily involves interpreting provisions under Minn. Stat. ch. 60A, the workers’ compensation courts lack subject matter jurisdiction to address these defenses.

While this court in *Ives v. Sunfish Sign Co.*, 275 N.W.2d 41 (Minn. 1979) held the workers' compensation courts had jurisdiction to address whether an insurer followed the proper statutory procedures to cancel an insurance policy, the *Ives* decision was decided before the enactment of Minn. Stat. § 60A.352 and Minn. Stat. § 60A.38.<sup>2</sup> In view of the additional defenses provided to the insurer pursuant to Minn. Stat. ch. 60A, the *Ives* decision is not controlling with regard to the issues raised in the amended pleading.

### CONCLUSION

The Hartford maintains the issues raised in the employers' Amended Petition for Declaration of Insurance Coverage should not be considered by this court, as the Amended Petition is not a part of the record on appeal. This court should confine its decision to the specific issues raised at the time the Petition for Writ of Certiorari was issued.

In the alternative, if the court considers the additional allegations raised by the employer in its amended pleadings, The Hartford asserts the workers' compensation courts do not have jurisdiction over the entire claim, as the employer appears to be alleging alternative theories of recovery. Specifically, the employer alleges The Hartford did not follow proper procedures to effectuate the cancellation and, in the alternative, appears to be alleging that if the cancellation were effective, The Hartford breached the terms of the insurance contract, as it cancelled the policy for nonpayment of premium by not allowing the employer to make installment payments of past due premiums. As more fully set forth in its Appeal Brief, The Hartford asserts the workers' compensation courts

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<sup>2</sup> Minn. Stat. § 60A.352 was enacted in 1986. Minn. Stat. § 60A.38 was enacted in 1987.

do not have jurisdiction over the breach of contract claim and, therefore, the workers' compensation courts lose jurisdiction over the entire claim.

If, based upon the amended pleadings, the employer has withdrawn its allegation that The Hartford breached the terms of the insurance contract, The Hartford still maintains the workers' compensation courts lack subject matter jurisdiction over the alleged ineffective cancellation claim. In order to address those issues and defenses, a court would have to interpret the provisions under Minn. Stat. ch. 60A, and the workers' compensation courts do not have subject matter jurisdiction to interpret statutory provisions which fall outside Minn. Stat. ch. 176.

Accordingly, The Hartford requests this court issue an Order reversing the decision of the Workers' Compensation Court of Appeals and dismissing the employer's claims in their entirety on the basis that the workers' compensation courts do not have jurisdiction over the disputes.

Respectfully submitted,

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Dated: 12/22/11

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**CERTIFICATE OF BRIEF LENGTH**

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I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 1 and 3, for a brief produced with a proportional font. The length of this brief is 1,874 words. This brief was prepared using Microsoft Word with 13-point Times New Roman font.

Respectfully submitted,

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